IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Reserved on 17th of September, 2024
Pronounced on 6th November, 2024

FAO No.1112 of 1988

Employees State Insurance Corporation ....Appellant

Versus

Punjab State Electricity Board ...Respondent

FAO-344-1986

E.S.I. ....Appellant

Versus

K.V. Grid ...Respondent

FAO-355-1986

E.S.I. ....Appellant

Versus

M/s 66 K.V. Grid ...Respondent

FAO-602-1991

Employees State Insurance Corporation ....Appellant

Versus

Punjab State Electricity Board ...Respondent

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. Adarsh Malik, Advocate for the appellant(s).

Mr. Kunal Mulwani, Advocate for the respondent(s).

PANKAJ JAIN, J.

By way of this order, I intend to dispose off aforesaid-captioned appeals. These appeals involve similar question of law in the background of identical set of facts.

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2. For brevity, the facts are being culled out from from FAO No.1112 of 1988.

3. Instant appeal is directed against judgment dated 26th of August, 2022 passed by Sub Judge, 1st Class, Phagwara exercising powers as ESI Court under ESI Act, 1948 whereby the petition filed under Section 75-78 of the ESI Act, 1948 by the respondent has been allowed.

4. Recovery certificate under Section 45-A was issued and attachment proceedings were initiated against the respondent through Assistant Collector 2nd Grade, Phagwara for recovery of Rs.6690-95 paise. Respondent challenged the demand before ESI Court. It was claimed that the demand raised by the ESI Corporation was based on adhoc assessment without any survey. The demand has been raised w.r.t. 132 KV Sub Station, Phagwara. The same does not fall within the purview of ESI Act as the strength of the staff is only three in number. The staff employed for maintenance like Mali, Sweeper at the Sub Station are on the roles of XEN D/S and not on the roles of KV Sub Station. It was thus claimed that the respondent was not liable to pay any amount towards ESI contribution.

5. Appellant contested the petition claiming that from report it is clear that all the employees working at 132 K.V. Sub Station are being paid by the respondent. Employees are covered under the ESI Act and the Rules made therein.

6. On the basis of the pleadings following issues were framed :

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"1. Whether the orders and other precedents are legal and in accordance with law? OPR.
2. Whether the order passed does not lack jurisdiction? OPR
3. Whether the respondents are entitled for recovery? OPR.
4. Whether the petition is not property filed by competent person? OPR.
5. Whether the application is liable to be accepted? OPA.
6. Relief."

7. Issues No.1, 2, 3 and 5 were taken together. It came in evidence that 132 KV Station at Phagwara belonging to Punjab State Electricity Board is in the area measuring 15.60 acres. Whole of the complex is under the control of XEN, PSEB, Phagwara. The Board allows one Mali, one Sweeper, one Chowkidar and one Gateman for every four acres of area. Thus, as per norms Board allowed 4 Malis, 4 Sweepers and 3 Chowkidars for the complex. Report Exhibit D-1, dated 29th of June, 1984 came on record. ESI Court came to the conclusion that the total strength sanctioned for 132 K.V. Station is 15 persons. No additional head could be employed beyond the sanctioned strength. The provisions of ESI are attracted where head count is more than 20. Finding the report Ex.D-1 against the facts, ESI Court allowed the petitions setting aside the recovery proceedings.

8. Counsel for the appellant at the outset submits that the instant appeal is fully covered by ratio of law laid down by this Court in FAO No.361 of 1988 decided vide order dated 2nd of April, 2024 and thus the same deserves to be allowed in the terms thereof.

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9. Counsel for the respondent joins issue thereon. He submits that the issues involved in the two appeals are totally different. It has been contended by him that issue involved in FAO No.361 of 1988 was *'Whether Grid Station was engaged in manufacturing and would thus fall within the ambit of 'factory' or not?'*

10. Mr. Mulwani submits that in the present appeal issue is totally different. *Dehors* the fact whether the Grid Station was involved in manufacturing process or not, the issue is whether it will be covered by the provisions of ESI Act keeping in view the number of workmen employed. He submits that since the head count employed on the Grid Station was less than 20, the same would not fall within the ambit of ESI Act and thus, the respondent was not liable to pay contribution under ESI Act. The demand raised by the appellant-Corporation being illegal was rightly found to be unsustainable by the ESI Court.

11. Faced with the situation counsel for the appellant submits that in terms of Section 1(6) of the ESI Act a factory or an establishment to which the act shall be applied shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified.

12. I have heard counsel for the parties and have carefully gone through the records of the case.

13. The dispute relates to demand raised by appellant Corporation for ESI contribution for the time period w.e.f. April, 1983 to April, 1984.

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The ESI Court allowed the petition filed by the respondent challenging the recovery holding that the head count of the persons employed at the grid was below 20 and thus the respondent would not fall within the ambit of 'factory' for the purpose of ESI Act. Thus, counsel for the respondent is right in submitting that the issue involved in FAO No.361 of 1988 is different and the ratio laid therein would not be applicable to the present case.

14. It is not disputed that area of Phagwara has been notified to be covered under the provisions of ESI Act prior to the date to which the demand raised by the appellant is relatable. Thus, here the question arises :

> *"Whether the respondent can be said to be covered under ESI Act or is not covered keeping in view the finding of fact recorded by ESI Court that number of workmen employed is less than 20?"*

15. Section 1 of the ESI Act deals with title, extent, commencement and application. The same reads as under:

> "**1. Short title, extent, commencement and application**
>
> (1) This Act may be called the Employees' State Insurance Act,1948.
>
> (2) It extends to the whole of India 1[***].
>
> (3) It shall come into force on such 2 date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and [for different States or for different parts thereof].

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> (4) It shall apply, in the first instance, to all factories (including factories belonging to the government) other than seasonal factories:
>
> [PROVIDED that nothing contained in this sub-section shall apply to a factory or establishment belonging to or under the control of the government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.]
>
> (5) The appropriate government may, in consultation with the Corporation and 5 [where the appropriate government is a State Government, with the approval of the Central Government], after giving six months' notice of its intention of so doing by notification in the Official Gazette, extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise
>
> [PROVIDED that where the provisions of this Act have been brought into force in any part of a State, the said provisions shall stand extended to any such establishment or class of establishments within that part if the provisions have already been extended to similar establishment or class of establishments in another part of that State.]
>
> [(6) A factory or an establishment to which this Act applies shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power.]

16. In terms of Section 1(4), the Act is applicable at the first instance to all factories including factories belonging to the government other than seasonal factories subject to notification in the official gazette under Section 1(3). 'Factory' is defined under Section 2(12). Prior to amendment of 1989, Section 2(12) read as under :

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> "Section 2(12)" 'factory means any premises including the precincts thereof where on twenty or more persons are working or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power or is ordinarily so carried on but dues not include a mine subject to the operation off the Indian Mines Act, 1923 or a railway running shed:"

17. The provision came for consideration before the Supreme Court in the case of **Employees State Insurance Corporation vs. Radhika Theatre, 2023 AIR (SC) 673**, wherein the Supreme Court held as under :

> "7. Prior to insertion of Sub-section (6) of Section 1 of the ESI Act, only those establishments/factories engaging more than 20 employees were governed by the ESI Act. However, thereafter, Sub-section (6) of Section 1 of the ESI Act has been inserted on 20.10.1989, and after 20.10.1989 there is a radical change and under the amended provision a factory or establishment to which ESI Act applies would be governed by the ESI Act notwithstanding that the number of persons employed therein at any time falls below the limit specified by or under the ESI Act. Therefore, on and after 20.10.1989, irrespective of number of persons employed a factory or an establishment shall be governed by the ESI Act."

(emphasis supplied)

18. Finding of fact recorded by the Commissioner regarding number of workmen employed with the respondent cannot be faulted as it has been proved that the maximum sanctioned strength was 15. In terms of

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provision prior to 1989, the determinating factor for any premises to come within the perview of 'factory' for the purpose of ESI Act, was not only the manufacturing purpose but also the number of persons employed. Prior to Amending Act of 1989, the mandate of the statute was that the factory means any premises including the precincts employing 20 or more persons. In the present case, number of persons employed being less than 20, the premises of the respondent would not fall within the ambit of 'factory' as adumbrated under Section 2(12) prior to Amending Act of 1989. The plea raised by counsel representing the appellant invoking Section 1(6) is also misplaced. Bare reading of Section 1(6) leads to the inference that the same governs those premises which were covered under the ESI Act prior to Amending Act of 1989. The same is clear from the following observations made by Apex Court in the *Radhika Theatre's* case (supra) :

> "7. ....Therefore, for the demand notices for the period after 20.10.1989, there shall be liability of every factory or establishment irrespective of the number of persons employed therein. With respect to such a notice it cannot be said that amended Section 1 inserting Subsection (6) is applied retrospectively as observed and held by the High Court. Only in case of demand notice for the period prior to inserting Sub-section (6) of Section 1 of the Act, it can be said that the same provision has been applied retrospectively. Therefore, the High Court has committed a very serious error in observing and holding that even for the demand notices for the period subsequent 20.10.1989 i.e., subsequent to inserting Sub-section (6) of Section 1 the said provision is applied retrospectively and the High Court has erred in allowing the appeal and setting aside the demand notices even for

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> the period subsequent to 20.10.1989. Sub-section (6) of Section 1 therefore, shall be applicable even with respect to those establishments, established prior to 31.03.1989/ 20.10.1989 and the ESI Act shall be applicable irrespective of the number of persons employed or notwithstanding that the number of persons employed at any time falls below the limit specified by or under the ESI Act."

19. Since there is nothing on record to prove that the respondent employed 20 or more than 20 persons prior to Amending Act of 1989, ESI Court rightly held that respondent was not covered under the ESI Act prior to 1989-the period for which demand was raised. Finding no merit in the instant appeal(s), the same are dismissed.

20. A copy of this order be kept on the files of other connected cases.

November 06, 2024 **(Pankaj Jain)**
Dpr **Judge**

Whether speaking/reasoned : Yes
Whether reportable : Yes

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